

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

State of Washington,

No. 38428-1-II

Respondent,

v.

HEATHER LYNN DENNIS,

UNPUBLISHED OPINION

Appellant.

Hunt, J. – Heather Lynn Dennis appeals her jury trial conviction for first degree theft. She argues that (1) the trial court erred by refusing to instruct the jury on the “good faith claim of title” defense, and (2) the no-contact provision in her judgment and sentence prohibiting her from contact with the Washington State Parks and Recreation Commission is overbroad. We affirm the conviction but remand for clarification of the no-contact provision.

FACTS

I. Background

After a work-related back injury ended Heather Lynn Dennis’s park ranger career, in August 2005 she began working as an administrative assistant in the Stewardship Center of the Washington State Parks and Recreation Commission. Her supervisor at the Commission’s headquarters was Edwin “Ted” Smith. From 2005 until the end of 2007, Health and Safety Manager Harry Mike Swigert worked with Dennis on “reasonable accommodation,”¹ in-the-

¹ When an employee is or becomes disabled, employers must make “reasonable accommodations” that allow the disabled person to perform the job functions. In this case, the Commission

workplace issues related to her back injury and post traumatic stress disorder (PTSD).

A. Dennis's Access to State Credit Card

As administrative assistant, Dennis was the Stewardship Center's credit card custodian. When the purchasing office issued the Center's credit card to Dennis, it provided her with an information sheet advising her of her responsibilities, including that she could not use the Center's credit card for personal expenses, noted in bold font. She was authorized to use this credit card to purchase supplies for the Center and to make other minor daily Center purchases that did not require bids. Dennis signed and acknowledged this information sheet in June 2006.

As the Stewardship Center's credit card custodian, Dennis's duties included reconciling the Center's credit card statement, filling out a monthly transaction log reporting all purchases charged to the card, signing a monthly report, and certifying its veracity. Dennis was required to certify that (1) the Center received the goods and services purchased with the Center's credit card; (2) the credit card purchases complied with state statutes, regulations, and guidelines; and (3) she, as the credit card custodian, had permission in writing from the responsible persons to "expend from cost codes other than [her] normal cost code."² After certifying the transaction log, Dennis forwarded it to the purchasing office. Her supervisor, Smith, could but was not required to review these monthly transaction logs if he noticed a budget discrepancy.

B. Dennis's Unapproved Requests for Commission to Pay for Course

accommodated Dennis's disabilities by placing her in a different type of job when her disabilities prevented her continuation as a park ranger.

² Cost centers and cost codes indicate what budget or subaccount within the agency pays the expense.

Between June and September 2007, Dennis asked Swigert and Smith if the Commission would pay for her to take a home-study court reporting course.³ They initially told her that the course did not appear related to her current position; nevertheless, both Swigert and Smith eventually told Dennis that she could fill out a training request form for the other to approve.⁴ But Swigert never saw a training request form from Dennis or any type of purchasing request for this course, even though he would have been responsible for approving the training as a “reasonable accommodation” request.⁵

Some time before September 2007, Dennis gave Smith a training request form requesting support for the in-home court reporting course.⁶ Smith had approved many of Dennis’s previous training requests, but he denied this one because it was not job-related or it did not appear that the course would further Dennis’s career with the Stewardship Center or the Commission. Smith noted on Dennis’s request form that he denied the request and forwarded the form to the

³ Dennis may have asked Swigert about the course as early as January 2007.

⁴ Sometime in 2007, Dennis also spoke to Becky Daniels, the Commission’s former human resources director, about her (Dennis’s) desire to take the court reporting course. Daniels recalled being “very clear” that the Commission did not have the authority to pay for training unless it was related to state careers or state activities. Daniels told Dennis that the Commission would help her in any way it could given its limitations under State law. But Daniels never (1) saw a request for training form from Dennis; (2) heard Swigert say that he had approved such a course; or (3) received any progress reports or updates, something Daniels normally would have received if the agency had sponsored Dennis’s requested training.

⁵ Dennis later claimed that Swigert had given her verbal permission to take the court reporting course as a “reasonable accommodation.”

⁶ It is not clear whether Dennis’s conversations with Swigert took place before or after Dennis gave Smith the training request form. But by the time Dennis gave Smith the form, Smith had already talked to Swigert about Dennis’s request for funding for the course. And Smith had already told Swigert that his (Smith’s) program could not pay for the course because it was not job related.

Commission's human resources office. Smith did not tell Dennis that he had denied this request.

Because Smith had denied Dennis's request, the human resources office did not process the form.⁷

In late September, Dennis again approached Smith about the in-home court reporting course. This time Smith told Dennis to send him more information about the course. On September 24, Dennis emailed Smith information about a course offered by SSD Enterprises. On October 10, Smith responded by email:

I really want to support you in getting to a place where you'll be happier and more content, but after looking at this I don't think this would be an appropriate training for the stewardship program to support. I'd like you to present this to Mike Swigert and see if he sees a way to make it happen or knows of other options for funding. Ted.

2 Report of Proceedings (RP) at 59-60.⁸ Dennis did not respond to Smith's email, and she never told Smith whether she had contacted Swigert. Dennis did not again mention the course to Smith until after March 2008.

In mid-January 2008, Dennis told Swigert that she had met with Smith, that they had agreed on a training plan, but that Smith's department did not have the funds to pay for the course. She then asked Swigert if he could fund the in-home court reporting course. Although Swigert told Dennis that he would be willing to look into it, the record does not show that he ever assented to her request.⁹

⁷ Some time before December 2007, Labor Relations Manager Christy Sterling received the training request form that Smith had denied. Because Smith had already denied the request, Sterling did not approve the training and either shredded the form or returned it to Dennis. Sterling never talked to Dennis about this request.

⁸ Swigert also received a copy of this email.

⁹ According to Swigert, Dennis may have told him that she had used her own money to purchase part of the course, but he could not recall exactly what she had said.

Also in January 2008, Smith, Swigert, Watness, Sterling, Daniels, and Dennis met several times to clarify Dennis's "reasonable accommodation" issues. During these meetings, the group reviewed Dennis's reasonable accommodation history, including any requests she had made and any agreements. Dennis never mentioned the in-home court reporting course, and there was nothing in her accommodation file relating to a request for the Commission to pay for a court reporting course.

C. Discovery of Dennis's Unauthorized Charge for In-Home Course

In March 2008, Smith discovered in the Center's budget and purchasing logs a September 20, 2007 "training" expense for \$4,034, which had been charged to the Center's credit card; he did not recognize this expense as one he had authorized. Investigating the charge, Smith discovered that Dennis had reported this expense as "training" in her October 2007 transaction log and had attached a vague invoice. Further investigation revealed that this "training" expense was for a home-study court reporting course from SSD Enterprises, which Smith knew he had never authorized.

Smith turned the matter over to Melanie Kay Watness, the Commission's human resources investigations and ethics manager, for additional investigation into possible employee misconduct. When Watness was unable to confirm that anyone had given Dennis permission to charge the course to the Center's credit card, Watness contacted the police.

II. Procedure

The State charged Dennis with first degree theft. The information alleged that Dennis had "wrongfully obtain[ed] or exert[ed] unauthorized control over property or services of another or

the value thereof, with intent to deprive said person of such property or services” and that the value exceeded \$1,500. Clerk’s Papers (CP) at 3 (emphasis added).

A. Administrative Investigation

The Parks and Recreation Commission conducted an administrative investigation.¹⁰ Watness and Daniels interviewed Dennis. Working separately, Watness and the police discovered that (1) Dennis had ordered the course on September 20, 2007; (2) she had placed the order from her personal email account; and (3) she had had the materials delivered to her home rather than to her workplace.¹¹ Dennis admitted to Watness that she had used the Stewardship Center’s credit card to pay for the course, which she also acknowledged Smith had refused to fund.

Dennis asserted that Smith had directed her to talk to Swigert and that Swigert had verbally approved purchasing the course as a “reasonable accommodation.”¹² Dennis could not, however, produce any documentation of such alleged verbal approval, and she admitted that she did not have Swigert’s approval in writing. Dennis further claimed that she told Swigert that she had purchased the course and assumed he would know that she had paid for it with the Stewardship Center’s credit card; she did not, however, claim that she had she ever told him that she had used the Center’s card to charge this expense. The Commission terminated Dennis’s employment for misuse of an agency credit card.

¹⁰ The Commission’s administrative investigation occurred after the State filed criminal charges against Dennis but before her trial.

¹¹ In addition, the order form indicated that Dennis used her home email and her home phone number and that she had listed her home address as both the shipping and billing address.

¹² Dennis also asserted that the court reporting course was job-related because she sometimes took minutes or notes at staff meetings.

B. Criminal Trial

Dennis pleaded not guilty to the criminal charge. The case went to a jury trial.

1. State's evidence

The State's witnesses testified consistent with the facts set out above. Smith and Swigert denied (1) having given Dennis permission to take the court reporting course at the Commission's expense, (2) having told Dennis that she could charge the course to the Stewardship Center, or (3) having been aware that Dennis had purchased the course until after Smith discovered the unauthorized credit card charge in March 2008. Although Dennis had recorded the charge in her October 2007 transaction log, none of the State's witnesses recalled having authorized this charge or Dennis's having told them that she had charged the course to Center's credit card. Nor did any of the State's witnesses recall Dennis's providing them with any progress reports, which is something they would have expected if the Center or Commission had paid for the course.

The State's witnesses also testified that if the course had been approved as part of Dennis's "reasonable accommodations," (1) Swigert would have had to approve the course and process a purchasing request; (2) Swigert would have paid for the course from his budget unless he had reached some type of agreement with Smith; and (3) Swigert would have told Smith that he (Swigert) had approved Dennis's taking the course at State expense. Furthermore, if someone had approved the course, (1) the human resources training manager would have had to determine what State funds would be used to pay for the course, and (2) human resources would have placed a record of the training in Dennis's training file. But Dennis's training file contained no such record.

2. Request for “good faith claim of title” instruction

Before presenting her defense, Dennis asked the trial court to instruct the jury on the “good faith claim of title” defense to theft, based on Washington Pattern Jury Instruction: Criminal 19.08,¹³ which provides in part: “It is a defense to a charge of theft that the property or service was appropriated openly and avowedly under a good faith claim of title, even if the claim is untenable.” 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 19.08, at 310 (3d ed. 2008). Ruling that this type of theft did not qualify for such defense, the trial court denied this request as follows:

In this case where we have an allegation that the defendant used a credit card, I don’t see how there could be a claim of ownership to either the credit card or to the money charged on the credit card, so therefore the defense is not available in this case.

3 RP at 209, relying on *State v. Self*, 42 Wn. App. 654, 713 P.2d 142, *review denied*, 105 Wn.2d 1017 (1986).

¹³ Following the trial court’s ruling, Dennis apparently did not submit the proposed instruction.

3. Defense evidence

Dennis then testified that (1) she had charged the course to the Center's credit card; (2) she did not intend to steal from the State; (3) she believed that Swigert had verbally approved the course as a "reasonable accommodation" and had agreed to pay for it with State funds¹⁴; (4) on September 24, 2007, she had emailed Smith additional course information he had requested, not to obtain his permission to take the course, because she believed that she already had Swigert's approval; (5) she did not have the impression that she would not be allowed to purchase the course with State funds; and (6) when she was involved in a series of "reasonable accommodation" meetings in January 2008, she did not mention the course because the meetings were about her PTSD accommodations, to which the course did not relate.

Dennis admitted that (1) she never told Smith that Swigert had approved the course; (2) although she recorded charging the course in her October transaction log, she never told Smith she had paid for the course from the Stewardship Center budget; (3) she believed that Smith would not pay for the course from the Stewardship Center;¹⁵ (4) even though Swigert had approved of her taking the course, he had never told her to charge it to the Stewardship Center's budget; (5) she simply assumed that because Swigert said he was going to talk to Smith, she could charge the course to the Stewardship Center's budget;¹⁶ and (6) she thought Swigert would

¹⁴ She testified that Swigert had agreed to pay for the course but not the transcription equipment and that she had agreed to purchase the equipment. Dennis did not charge the transcription equipment to the Stewardship Center.

¹⁵ Dennis testified, "My impression was that Mr. Smith could not cover the cost."

¹⁶ Dennis testified that she charged the course to Smith's Stewardship Center funds "because Mike Swigert was gonna talk to Ted [Smith] about the cost code." 3 RP at 262. She had assumed that Swigert would contact Smith "to let him know what the cost center was and then that's how that was gonna be taken care of was through that training request approved through

have to pay for the course through his budget, not Smith's.

The jury found Dennis guilty of first degree theft, as charged.

C. Sentencing

At the State's request, the trial court included the following no-contact provision in Dennis's judgment and sentence: "The defendant shall not have contact with WA State Parks Commission . . . including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 10 years." CP at 20 (Sec. 4.3). This restriction had apparently been part of the terms of Dennis's release during pending trial. There is no discussion in the record before us on appeal about the scope of the no-contact provision. Dennis did not object when the State proposed this restriction; nor did she seek more specific or narrowly tailored conditions.

Dennis appeals her conviction and the no-contact provision in her judgment and sentence.

ANALYSIS

I. "Good Faith Claim of Title" Defense

Dennis first argues that the trial court erred when it refused to instruct the jury on the "good faith claim of title" defense to first degree theft, based on its misconstruction of the law in concluding that this defense was not available for this type of theft. We need not reach the issue of whether the trial court erred in its legal conclusion about the availability of this defense because Dennis failed to present evidence establishing that she was entitled to the defense under any construction. Therefore, Dennis's argument fails. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) (we may affirm on any ground supported by the record).

[Swigert] but informing [Smith]." 3 RP at 261. "Cost centers" indicate which budget pays the expense.

A. Standard of Review

Each party “is entitled to have the jury instructed on its theory of the case if there is substantial evidence to support that theory.” *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997) (citing *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)). We review a trial court’s refusal to give a requested instruction, when based on lack of factual support, for an abuse of discretion; we review de novo a trial court’s refusal to instruct based on a question of law. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996) (citations omitted), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997).

B. No Factual Support

To be entitled to the “good faith claim of title” defense and jury instruction, Dennis had to present *some* evidence of a legal or factual basis for her good faith belief of entitlement to charge the at home court reporting course to the Stewardship Center’s credit card. *State v. Ager*, 128 Wn.2d 85, 96-97, 904 P.2d 715 (1995). In this she failed.

There was no evidence that anyone authorized Dennis to charge the court reporting course to the Stewardship Center’s funds. There was no evidence, not even from Dennis,¹⁷ from which a jury could *infer* that anyone authorized Dennis to charge the course to the Stewardship Center’s funds. Thus, even assuming, without deciding, that the trial court erred when it determined that the “good faith claim of title” defense did not apply to this type of theft, any such error was harmless because the evidence did not support giving this instruction. We hold, therefore, that the trial court did not abuse its discretion in denying Dennis’s requested

¹⁷ Dennis’s testimony about her *belief* that Swigert had verbally agreed that the Commission would somehow pay for the course does not meet the requisite standard.

instruction.

II. No-Contact Provision

Dennis next challenges the no-contact provision in her judgment and sentence that prohibits her from contact with the Washington State Parks Commission for ten years.¹⁸ She argues that (1) this provision is vague and potentially overbroad; and (2) the no-contact provision potentially violates her first amendment¹⁹ free speech and association rights. She asks that we remand for clarification of the no-contact provision. Although the State has no “particular objection to a remand for clarification of this condition,” it does not believe that remand for clarification is necessary. We disagree.

We review the trial court’s imposition of a no-contact order for abuse of discretion. *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). The Sentencing Reform Act, chapter 9.94A RCW, expressly authorizes the sentencing court to impose and to enforce crime-related prohibitions and affirmative conditions, including no-contact orders. RCW 9.94A.505(8); *State v. Armendariz*, 160 Wn.2d 106, 113, 156 P.3d 201 (2007). A crime-related prohibition is “an order of a court prohibiting conduct that *directly* relates to the circumstances of that crime for which the offender has been convicted[.]” RCW 9.94A.030(13) (emphasis added). No causal link

¹⁸ Dennis appears to acknowledge that this claim may not be ripe for review under *State v. Valencia*, 148 Wn. App. 302, 320, 198 P.3d 1065, *review granted sub nom State v. Turner*, 166 Wn.2d 1010 (2009), and *State v. Brewer*, 148 Wn. App. 666, 205 P.3d 900 (2009), *review denied sub nom State v. Danielson*, 166 Wn.2d 1016 (2009), which cases she argues were wrongly decided. Br. of Appellant at 10-13. Both *Valencia* and *Brewer* involved challenges to potentially vague community custody conditions, not to whether a no-contact provision was crime related. Accordingly, these cases do not apply here.

¹⁹ U.S. Const., art. I, amend. 1.

between the prohibition imposed and the crime committed is required as long as the prohibition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). “The existence of a relationship between the crime and the condition ‘will always be subjective, and such issues have traditionally been left to the discretion of the sentencing [court].’”²⁰

Under RCW 9.94A.505(8), the trial court could prohibit Dennis from contacting any Washington State Parks Commission employee who was involved in this case and from entering or contacting the Washington State Parks Commission Headquarters where she had been employed because Dennis’s offense related to her work within the Commission Headquarters. But, although this no-contact order does not expressly prohibit her from (1) entering any Washington State park as a member of the public or (2) outside the Commission’s site and workday, continuing any preexisting personal relationships with people who work for the Commission, we agree with Dennis that its broad language could be construed as going beyond conduct that is directly related to the circumstances of the crime charged—it could, as Dennis argues, also prohibit her from entering any Washington State park as a member of the public or continuing a preexisting personal relationship with someone who works for the Commission. Dennis’s offense did not relate to her activities within any State park as a guest or to her personal relationships with any Commission employee. Thus the language in Dennis’s judgment and sentence is overbroad, and we remand for clarification of the no-contact provision.

²⁰ *State v. Warren*, 134 Wn. App. 44, 70, 138 P.3d 1081 (2006) (quoting *State v. Parramore*, 53 Wn. App. 527, 530, 768 P.2d 530 (1989)), *aff’d*, 165 Wn.2d 17 (2008), *cert. denied*, 129 S. Ct. 2007 (2009).

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Accordingly, we affirm the conviction and sentence, but we remand for clarification of the no-contact provision.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, P.J.

Bridgewater, J.